84-380

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No. ____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

W. HENSON MOORE, U.S. REPRESENTATIVE, SIXTH DISTRICT, LOUISIANA, *et al.*,

*Petitioners,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## QUESTION PRESENTED

May a Court of the United States refuse to decide a justiciable constitutional question patently within its jurisdiction solely on the grounds that, in its discretion, it chooses not to do so?

## PARTIES INVOLVED

The plaintiffs and petitioners are W. Henson Moore, Philip M. Crane, Elliott Levitas, Stephen L. Neal, James D. Santini, Billy Lee Evans, Ed Bethune, Richard C. Shelby, Bob Stump, Carroll Hubbard, Jr., John H. Rousselot, Richard T. Schulze, Daniel B. Crane, James E. Jeffries, James G. Martin, and Larry E. Craig. All were members of the United States House of Representatives in the Ninety-Seventh Congress. The defendants and respondents are the United States House of Representatives, Thomas P. O'Neill, Jr., the Speaker of the House, and Edmund L. Henshaw, Jr., the Clerk of the House; the United States Senate, George H. W. Bush, the President of the Senate, and William F. Hildenbrand, the Secretary of the Senate. The United States intervened as a party defendant.

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# Supreme Court of the United States

OCTOBER TERM, 1984

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W. HENSON MOORE, U.S. REPRESENTATIVE,
SIXTH DISTRICT, LOUISIANA, *et al.*,
*Petitioners*,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
*Respondents*.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

### PETITION

Petitioners W. Henson Moore and fifteen other members of the House of Representatives respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on May 4, 1984, rehearing denied June 29, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

### OPINIONS BELOW

The opinion of the Court of Appeals is reported at 733 F.2d 946 (D.C. Cir. 1984), and is reproduced, together with the concurring opinion, as Appendix A hereto. The opinion of the United States District Court is reported at 553 F. Supp. 267 (D.D.C. 1982), and is reproduced as Appendix B hereto.

## CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 7, Clause 1 of the United States Constitution ("the Origination Clause") provides:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose and concur with Amendments as on other Bills.

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution . . . of the United States.

28 U.S.C. § 2201 provides in pertinent part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 1291 provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

## STATEMENT OF THE CASE

Plaintiff Moore and fifteen other members of the Ninety-Seventh Congress sought a declaratory judgment that the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. No. 97-248, hereinafter called "TEFRA") had been enacted in violation of the Origination Clause of the Constitution, which requires that "[a]ll Bills for raising Revenue shall originate in the House of Representatives. . . ." As Plaintiffs' argument to the District Court showed, TEFRA "originated" in the Senate, not in the

House, and was therefore unconstitutionally enacted. The District Court, however, did not reach the merits of the plaintiffs' claims. It assumed, as it was required to do, *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), that TEFRA was indeed unconstitutional, but held that the plaintiffs lacked standing because they "have not demonstrated the injury-in-fact required by Art. III to invoke the judicial power." (553 F. Supp. at 270, App. B at 42a.) As an alternative ground, the District Court held that "the doctrine of equitable discretion announced by [the D.C.] Circuit in *Riegle v. Federal Open Market Committee* [656 F.2d 873 (D.C. Cir. 1981)] squarely governs this action and mandates dismissal." (553 F. Supp. at 271, App. B at 44a.)

The Court of Appeals affirmed solely on the latter ground. It reversed the District Court's finding that plaintiffs lacked standing and held that the "injury alleged by appellants here is to an interest positively identified by the Constitution, which mandates a specific procedure by which a revenue-raising bill shall become law. . . . The appellants allege a specific injury in fact to a cognizable legal interest: the deprivation of an opportunity to debate and vote on the origination of TEFRA in the House," (733 F.2d at 951, App. A at 9a); that the plaintiffs' injury "is within the zone of interests protected by the Origination Clause," (*Id.* at 953, App. A at 14a); is "traceable to the challenged acts of the defendants," (*ibid*); and finally that "the injury alleged here is capable of redress by the Judiciary." (*Id.* at 954, App. A at 15a). Accordingly, the plaintiffs met all of the tests for standing articulated by this Court in *Baker* v. *Carr*, 369 U.S. 186 (1962); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Sierra Club* v. *Morton*, 405 U.S. 727 (1972); *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon* v. *Eastern Kentucky Welfare Rights*

*Organization*, 426 U.S. 26 (1976); and, most recently, in *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

Notwithstanding its decision that the cause of action was justiciable, and that these plaintiffs had standing to maintain it, the Court of Appeals refused to address the merits of the case (or to remand to the District Court for a decision there). Rather, it held that "[w]hile the separation-of-powers concerns presented by this case do not deprive the court of power to adjudicate under Article III . . . the proper exercise of judicial discretion to grant or withhold declaratory relief" (733 F.2d at 954, App. A at 15a) permits the federal courts simply not to decide the case at bar. "[T]he doctrine of remedial discretion permits the court to exercise judicial self-restraint in particular matters intruding upon a coordinate branch of government, and avoids both distorting the constitutional requirements for standing articulated by the Supreme Court in recent cases, and rewriting our own decisions on standing." (*Id.*, App. A at pp. 15a-16a).

## REASONS FOR GRANTING THE WRIT

1. The D.C. Circuit has claimed a novel and extra-legal power in this case which unambiguously contradicts principles of jurisdiction long adhered to by this Court. It holds that federal courts have power to refuse judgment of a justiciable matter over which their jurisdiction has properly been invoked. The doctrine of "remedial" or "equitable" discretion to refuse judgment contradicts the "virtually unflagging obligation . . . [of federal courts] to exercise the jurisdiction given them." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . ." *Willcox* v.

*Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). *See also England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964). No proposition of federal court practice comes with better credentials. More than 160 years ago, Chief Justice Marshall wrote:

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

2. But in the past three years, the D. C. Circuit has decided an entire line of cases in contradiction of the fundamental principle just stated. The prototype, *Riegle v. Federal Open Market Committee*, 656 F.2d 873, *cert. denied*, 454 U.S. 1082 (1981), employed the doctrine of what was there called "equitable discretion" to dismiss the action of a legislator-plaintiff on the theory that he could (i) "obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute. . . ." 656 F.2d at 881, and (ii) "a similar action could be brought by a private plaintiff." *Id.* at 882. The concern was that the court not intrude into the legislative process (although unconstitutional legislative action is hardly a novel subject of federal judicial cognizance, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)); but the limiting principle invoked in pursuit of this purpose was unfathomable. *Any* unconstitutional statute could be

cured by amendment or repeal, from which it follows that a congressional plaintiff could *never* proceed as of right for an injury-in-fact to his constitutionally-conferred powers—even though he indisputably possessed standing: even though the case were incontrovertibly justiciable—unless in the "equitable discretion" of the federal courts he were permitted to do so. *Vander Jagt* v. *O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983), seemingly abandoned the second part of the *Riegle* test, thus broadening the rule still further. It involved a matter—the apportionment of House Committee memberships as between the two political parties—as to which no one *but* a congressional plaintiff would have standing. But the Court of Appeals, under the rubric of "remedial discretion," held that the case should not be decided despite explicitly holding that doctrines of standing, political questions, or Speech and Debate Clause immunity did not bar the suit. Judge Bork excoriated this "unconfined judicial power to decide or not to decide" cases, *see* 699 F.2d at 1185 (concurring opinion), for it robes an active vice in the garments of a passive virtue. *Crockett* v. *Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) relies upon the same doctrine. The present case is but the latest of this runaway doctrinal sport.

3. There can be little question that the plaintiffs were entitled to a judgment from the courts below. No court appears to have held that Origination Clause issues are nonjusticiable matters, and indeed this Court has decided the merits of such a case before. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1910). *See also Karpowycz* v. *United States*, 586 F. Supp. 48 (N.D. Ill. 1984); *Stamp* v. *Commissioner of Internal Revenue*, 579 F. Supp. 168 (N.D.

Ill. 1984); *Frent v. United States*, 571 F. Supp. 739 (E.D. Mich. 1983). A non-justiciable political question involves:

> A textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

On the face of it, none of these standards would inhibit a judgment here. The policy and the standard of conduct are given in plain language by the Constitution. Whether these have been adhered to is a question not textually committed to a non-judicial department. Plaintiffs' cause of action passes the justiciability test, for the duty is stated by the Constitution and the protection sought is simply a declaration of the rights of the plaintiffs, not coercive relief. *See Powell* v. *McCormack*, 395 U.S. 486, 517 (1969).

Moreover, as the Court of Appeals found, these plaintiffs do have standing. Indeed, a contrary holding would necessarily imply that the Congress may waive a plainly-given constitutional command. If this were ever a tenable doctrine, it surely cannot be so after *Immigration and Naturalization Service* v. *Chadha*, ___ U.S. ___, 77 L.Ed. 2d 317 (1983), which involved the unconstitutional arrogation of the veto power to one house of the Congress—an arrogation that had commanded the assent of *both* houses *and* the President; or after *Buckley* v.

*Valeo*, 424 U.S. 1 (1976), where duly-enacted legislation was held unconstitutional because it gave an appointments power to the Congress.

The plaintiffs here have suffered an injury to their constitutionally-given duty to debate and vote on the origination of a bill for raising revenue. This is a duty which cannot be delegated to Senators or discharged by officers in any other department of government, but only by members of the House of Representatives. Assuming, as one must, the truth of the facts alleged in the complaint, the plaintiffs have been deprived of the opportunity to exercise powers that only they and their colleagues possess. The injury stems directly from the challenged action, to wit, the origination of TEFRA in the United States Senate. A declaration of TEFRA's unconstitutionality would suffice to restore to the plaintiffs that which they have lost, for it must be presumed that the legislative branch will act lawfully when it knows what the Constitution requires. There can be no doubt that plaintiffs have standing.

4. Although it is axiomatic that the Declaratory Judgment Act "confers a discretion on the courts rather than an absolute right upon the litigant," *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952), that discretion is not unbounded and must not be exercised capriciously. This Court has found that circumstances may exist which oblige federal courts exercising equity-like powers "to withhold their relief in furtherance of a recognized, defined public policy." *Meredith* v. *City of Winter Haven*, 320 U.S. 228, 235 (1943). But it must be asked, what public policy did the Court of Appeals rely upon in this case to justify withholding judgment? The policy upon which it relies is that of non-interference with a coordinate branch of the government. This is but a

restatement of the issue whether the cause of action presents a political question or is otherwise non-justiciable. The Court of Appeals itself held that these doctrines were inapplicable to the facts of the present case. It could hardly have held otherwise, because the interference with legislative prerogatives here is no different from that entailed by any inquiry into the constitutionality of a statute. The "interference" argument, indeed, is wholly question-begging, for it could hardly be supposed that the Congress has any prerogative to legislate other than in the manner prescribed in the Constitution. If, as the Court of Appeals ruled, plaintiffs bring a justiciable controversy for decision, there can be no ground of policy or prudence upon which to base the "equitable" or "remedial" discretion to withhold judgment. *See, e.g., Wesberry* v. *Sanders*, 376 U.S. 1 (1964), where this Court reinstated a complaint about congressional district malapportionment that had been improperly dismissed "for want of equity," i.e., because the lower court had mistakenly supposed that the case presented a "political question." Notwithstanding that the lower court there had "discretion," the plaintiffs were entitled to relief. Similarly, in *Powell* v. *McCormack*, 395 U.S. 486 (1969), this Court held that the entry of a declaratory judgment was obligatory, notwithstanding the discretionary character of such relief. In the Court of Appeals, two judges expressly relied on a theory of discretionary abstention similar to that relied upon in the instant case. *Powell* v. *McCormack*, 395 F.2d 577 at 597, 608 (D.C. Cir. 1968). But this Court held that, the case being justiciable, the courts could not avoid their constitutional responsibility by reliance upon discretion to withhold judgment.

Having correctly concluded that nothing interferes with the justiciability of the plaintiffs' cause of action, and

in the absence of any other reason to withhold judgment, the Court of Appeals should have either decided the merits itself or remanded the case to allow the District Court to do so.

The time has come here, as it had in *Chadha* with regard to the "legislative veto," for this Court to put an end to the tolerance of unconstitutional legislative procedures by the District of Columbia Circuit. The right to constitutional protection cannot be dependent on the "discretion" of a majority of a Court of Appeals panel.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 83-1077

W. HENSON MOORE, U.S. REPRESENTATIVE, 6th DISTRICT, LA., et al., APPELLANTS

v.

U.S. HOUSE OF REPRESENTATIVES, et al.

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No. 83-1190

RON PAUL, U.S. REPRESENTATIVE, 22nd DISTRICT OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA, et al.

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Appeals from the United States District Court for the District of Columbia

(Civil Action Nos. 82-02318 and 82-02352)

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Argued 13 October 1983

Decided 4 May 1984

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*James L. Kaler* with whom *Sherwood B. Smith, Jr.* was on the brief, for appellants in Nos. 83-1077 and 83-1190.

*Ron Paul* entered an appearance *pro se* in No. 83-1190.

*Douglas Letter*, Attorney, Department of Justice with whom *J. Paul McGrath*, Assistant Attorney General, *Stanley S. Harris*, United States Attorney (at the time the brief was filed) and *Leonard Schaitman*, Attorney, Department of Justice were on the brief, for appellees, United States in Nos. 83-1077 and 83-1190.

*Stanley M. Brand*, General Counsel, House of Representatives with whom *Steven R. Ross*, Deputy Counsel, House of Representatives was on the brief for appellees, United States House of Representatives, et al. in Nos. 83-1077 and 83-1190.

*Morgan J. Frankel*, Assistant Senate Legal Counsel with whom *Michael Davidson*, Senate Legal Counsel, *M. Elizabeth Culbreth*, Deputy Senate Legal Counsel and *Charels Tiefer*, Assistant Senate Legal Counsel were on the brief, for appellees, United States Senate, et al. in Nos. 83-1077 and 83-1190.

Before: WILKEY and SCALIA, *Circuit Judges*, and LUMBARD, *Senior Circuit Judge* for the United States Court of Appeals for the Second Circuit.

Opinion for the court filed by *Circuit Judge* WILKEY.

Concurring opinion filed by *Circuit Judge* SCALIA.

WILKEY, *Circuit Judge*: Eighteen members of the United States House of Representatives appeal from a decision of the district court which dismissed their challenge to the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982.[1] The district court dis-

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[1] 553 F. Supp. 267 (D.D.C. 1982) (mem.).

missed their complaint on the ground that the legislators lacked standing, and, alternatively, on the ground that in the court's remedial discretion, declaratory relief should not be granted for the stated claim. We hold that the appellants have standing to sue, but we affirm the district court's dismissal as a proper exercise of the court's remedial discretion to withhold declaratory relief for the appellants' claim.

## I. BACKGROUND

All of the appellants were members of the United States House of Representatives ("the House") for the 97th Congress, and some of them were also members of the Committee on Ways and Means of the House in that Congress. The appellants sued the United States House of Representatives, the United States Senate, the Speaker of the House, the President of the Senate, the Clerk of the House, and the Secretary of the Senate in the District Court for the District of Columbia. The United States intervened as a defendant in the case. Appellants sought a declaratory judgment that the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA")[2] was unconstitutional because it originated in the Senate in contravention of the Origination Clause of the U.S. Constitution. That clause provides that all "bills for raising revenue" shall originate in the House, although the Senate may make amendments as on other bills.[3]

The appellants' complaint alleges the following facts.[4] On 14 December 1981, H.R. 4961, which had been intro-

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[2] Pub. L. No. 97-248.

[3] U.S. CONST. art. I, § 7, cl. 1. The Supreme Court has adjudicated several challenges to revenue acts under the Origination Clause, brought by private plaintiffs. *See, e.g., Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Millard v. Roberts*, 202 U.S. 429 (1906).

[4] This appeal comprises two cases filed in the district court. Representative W. Henson Moore and 17 other members of

duced in the House, was reported favorably to the House by the House Committee on Ways and Means. As reported by the Committee, the bill comprised six sections amending the Internal Revenue Code, the net effect of which would have been to reduce the amount of tax revenue collected. The House approved H.R. 4961 without amendment and sent it to the Senate on 15 December 1981.[5]

The bill was received by the Committee on Finance of the Senate, which reported H.R. 4961 favorably to the Senate on 12 July 1982. The bill as reported to the Senate still carried the House bill number but it had been substantially amended. The six revenue-reducing provisions following the bill's enacting clause had been deleted and replaced by a massive tax-increasing proposal. Instead of reducing the amount of revenue collected, the bill as amended proposed to increase revenue by more than $98 billion over three years. The Senate passed the amended H.R. 4961, newly entitled "The Tax Equity and Fiscal Responsibility Act of 1982," and returned it to the House.[6]

Upon the bill's return to the House, Appellant Rousselot offered a resolution to the House which proposed to resolve that the Senate's amendments to H.R. 4961 contravened the Origination Clause of the Constitution. His proffered resolution further proposed that the bill be returned to the Senate without further action by the House. The Chairman of the Committee on Ways and

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the House filed a complaint in August 1982; Representative Ron Paul filed a similar action two days later. Because the two cases present common questions of law, they were consolidated in the district court. References to the complaint hereinafter are to the complaint filed by Representative W. Henson Moore, et al.

[5] Complaint ¶¶ 3, 4; Joint Appendix (J.A.) at 17.

[6] Complaint ¶¶ 5-7; J.A. at 17-18.

Means of the House moved to table the appellant's resolution and the motion to table carried the House. The Chairman of the House Committee on Ways and Means, at the direction of the Committee, then moved to send H.R. 4961 to conference with the Senate, without first referring it back to the House Committee on Ways and Means. The House agreed to that motion, and the bill was sent to conference.[7] H.R. 4961 was subsequently reported out of joint conference and it passed both the House and the Senate in August 1982. The President signed the bill into law.

The appellants' complaint charges that the revenue bill as originally introduced in the House was not a bill for "raising revenue" within the meaning of the Origination Clause, because the net effect of the bill would have been to reduce the amount of revenue collected. Thus, the appellants charge, when the Senate amended H.R. 4961 so that the net effect of the bill's provisions was to increase the amount of revenue collected, the bill became one for raising revenue and it originated improperly in the Senate.[8] The merit of the appellants' claim turns on whether the phrase in the Origination Clause referring to "bills for raising revenue" means bills that increase revenue, in which case TEFRA unconstitutionally originated in the Senate under the alleged facts, or whether the phrase means all bills for collecting revenue—revenue-increasing as well as revenue-decreasing bills—in which case TEFRA constitutionally originated in the House and

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[7] Complaint ¶¶ 8-10; J.A. at 18.

[8] The appellants have not claimed that the Senate's amendments are unlawful on the ground that amendments of this magnitude are beyond the scope of the Senate's power to amend with respect to any type of bill. *See Flint v. Stone Tracy Co.*, 220 U.S. 107, 143 (1911) (Senate may propose any amendment "germane to the subject-matter of the bill").

was merely amended by the Senate according to the facts stated in the appellants' complaint.[9]

In their complaint, the appellants allege injury in their official capacities as members of the House and of the Committee on Ways and Means of the House by the defendants' interference with the appellants' legislative duties in originating bills for raising revenue. They further allege that they were injured individually and derivatively as members of the House by abrogation of the right of the House to originate bills for raising revenues.[10]

The plaintiffs moved for summary judgment in the district court and the defendants moved to dismiss the complaint on the grounds that the plaintiffs lacked standing and that the court should exercise its remedial discretion to withhold relief. The district court granted the defendants' motion to dismiss, holding that the plaintiffs lacked standing, and, alternatively, that the doctrine of remedial discretion warranted dismissal.

## II. STANDING

The district court held that the appellants had not alleged an injury in fact sufficient to give rise to standing. We disagree. For the purposes of determining the standing of appellants to sue, we must assume the validity of the appellants' claim and construe the complaint in favor of the complaining parties.[11] Thus we assume, but do not decide, that TEFRA unconstitutionally originated in the Senate under the alleged facts.

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[9] *See Armstrong v. United States* (S.D. Cal. 2 September 1983) (mem.) (interpreting the phrase to mean bills related to the collection of revenue); *Frent v. United States*, 571 F. Supp. 739 (E.D. Mich. 1983) (same).

[10] Complaint ¶ 13; J.A. at 19.

[11] *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982).

Article III of the Constitution limits the jurisdiction of the federal courts to "cases or controversies." This constitutional limitation on the power of the federal judiciary is reflected in principles of standing, which ensure that a party who invokes the court's jurisdiction presents a case that falls within the constitutional power of the federal courts.[12] As the Supreme Court stated in *Baker v. Carr*, in order to be a proper party to litigate a claim, the claimant must "allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." [13] In the recent case of *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Supreme Court noted that this precondition is essential in order properly to confine the role of the Judiciary in the tripartite system of government mandated by the Constitution.[14]

The particular requirements of standing were summarized by the Supreme Court in *Valley Forge*:

> Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" . . . and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision" . . . .[15]

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[12] *See Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Metcalf v. National Petroleum Council*, 553 F.2d 176, 189-90 (D.C. Cir. 1977).

[13] 369 U.S. 186, 204 (1962); *see Sierra Club v. Morton*, 405 U.S. 727 (1972); *Flast v. Cohen*, 392 U.S. 83 (1968).

[14] 454 U.S. 464, 474 (1982).

[15] *Id.* at 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)).

In addition, the claimant's injury must fall within the zone of interests protected by the constitutional provision allegedly violated.[16] Applying those requirements to the instant case, we must determine whether (1) the congressional claimants suffered an injury in fact (2) to an interest protected by the Origination Clause, (3) which injury was caused by the defendants' actions, and (4) which injury could be redressed by a favorable decision of the court.[17] We address each of these requirements in turn.

The appellants allege a specific injury in fact to a cognizable legal interest, thereby satisfying the first requirement of standing.[18] Suits against coordinate branches of government by congressional plaintiffs pose separation-of-powers concerns which may affect a complainant's standing to invoke the jurisdiction of the federal courts. To the extent that the Constitution envisions limited federal court jurisdiction out of respect for the coordinate branches of government, we have been reluctant to grant standing to members of Congress alleging generalized, amorphous injuries due to either the actions of their colleagues in Congress or the conduct of the Executive. Although the parties in *Valley Forge* were private taxpayers and a private college and not, as here, members of coordinate branches of government, this recent Supreme Court case reinforces the principle that

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[16] *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

[17] *See Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); *Metcalf v. National Petroleum Council*, 553 F.2d 176, 187 (D.C. Cir. 1977).

[18] In *Community Nutrition Institute v. Block*, we noted that "the injury must be definable and discernible and, in order to establish the proper connection to the plaintiff, it must be specific." 698 F.2d 1239, 1246 (D.C. Cir.), *cert. granted*, 104 S. Ct. 480 (1983).

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where separation-of-powers concerns are present, the plaintiff's alleged injury must be specific and cognizable in order to give rise to standing.[19] Likewise, in *Harrington v. Bush*, this court insisted that congressional complainants clearly allege a concrete injury in fact to a specific legal interest in order to invoke the jurisdiction of the court.[20]

The injury alleged by appellants here is to an interest positively identified by the Constitution, which mandates a specific procedure by which a revenue-raising bill shall become law. The Origination Clause provides:

> All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose and concur with Amendments as on other bills.[21]

The appellants allege a specific injury in fact to a cognizable legal interest: the deprivation of an opportunity to debate and vote on the origination of TEFRA in the House. The appellants claim a specific injury in their official capacities as members of the House by the nullification of their right to originate, by debate and vote, a bill for raising revenue prior to legislative action by the Senate.

It is important to note that the injury claimed here is to the members' rights to participate and vote on legislation in a manner defined by the Constitution. Deprivation of a constitutionally mandated process of enacting law may inflict a more specific injury on a member of Congress than would be presented by a generalized complaint that a legislator's effectiveness is diminished by allegedly illegal activities taking place outside the legisla-

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[19] 454 U.S. at 474.

[20] *See Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977).

[21] U.S. CONST. art. I, § 7, cl.1.

tive forum.[22] In *Kennedy v. Sampson*,[23] for example, this court held that Senator Kennedy had standing to sue the Executive for injury allegedly due to an unlawful pocket veto of legislation which the Senator had supported. The court found that the deprivation of a constitutional process by which a bill becomes law was a sufficiently specific injury to support standing by the congressional plaintiff. By contrast, in *Harrington v. Bush*, this court denied standing to a member of the House who claimed that certain activities of the Central Intelligence Agency were illegal, and that such unlawful conduct diminished his effectiveness as a legislator.[24] The Court found that the complaining party did not have a connection to the claimed unlawful acts of the CIA such that the outcome of the case would cause him to win or lose: he was merely a bystander. Likewise, in *American Federation of Government Employees v. Pierce*, this court held that a member of the House lacked standing to sue over the allegedly improper execution of an enacted law.[25] The injury to the legislator was a generalized grievance about the conduct of government, not a claim founded on injury to the legislator by distortion of the process by which a bill becomes law—a process in which a legislator has a right and a duty to participate.

Appellants' claimed injury here does not descend to the level of being a subjective, amorphous grievance of the legislators' diminished effectiveness due to defendants' unlawful conduct. The appellants' claimed injury—the deprivation of debate and a vote in the origination of revenue-raising legislation—is specific and concrete. The

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[22] *See, e.g., American Federation of Government Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982); *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

[23] 511 F.2d 430 (D.C. Cir. 1974).

[24] 553 F.2d 190, 205, 206 & n. 68 (D.C. Cir. 1977).

[25] 697 F.2d 303 (D.C. Cir. 1982).

claimants have satisfied the requirement of alleging a clear injury in fact, which is essential in order to obtain judicial review of the actions of a coordinate branch of government.

Furthermore, the fact that the House as a body may have been injured by the allegedly unconstitutional origination of TEFRA in the Senate does not negate an injury in fact to the individual members. In *Kennedy v. Sampson*,[26] this court noted that when Congress' role in government is diminished by unconstitutional Executive action so, too, is the official role of individual members of Congress. Likewise, in *Goldwater v. Carter*,[27] we held that individual Senators had standing to sue the Executive in a challenge to the constitutionality of the President's termination of a Mutual Defense Treaty with Taiwan without the consent of the Senate. In *Goldwater*, the fact that the claimed unconstitutional conduct may have injured the Senate as a body did not deprive the individual Senators of standing to sue. Standing principles do not require that a party be the most grievously injured, only that he be "among the injured." [28] Appellants here claim deprivation of a particular opportunity to vote in a manner prescribed by the Constitution. Both the alleged injury and the legal interest are specific and concrete.[29]

Never has it heretofore been suggested, as the concurrence now posits, that specific injury to a legislator in his official capacity is not a cognizable harm in the federal courts. In each congressional standing case before this

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[26] 511 F.2d 430 (D.C. Cir. 1974).

[27] 617 F.2d 697 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979).

[28] *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972); *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974).

[29] *Accord, Metcalf v. National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977).

court, the inquiry has properly focused on whether the harm to the legislator is definable and discernible in determining whether a congressional plaintiff has standing. From *Kennedy v. Sampson* to *Harrington v. Bush* and *American Federation of Government Employees v. Pierce*, we have held that unconstitutional deprivations of a legislator's constitutional duties or rights, such as the nullification of a legislator's vote by illegal Executive action, may give rise to standing if the injuries are specific and discernible.[30]

*Valley Forge* supports this method of analysis, as that case scrutinized the specificity of the plaintiffs' injury in holding that private taxpayers lacked standing when they failed to suffer any actual injury by an allegedly unconstitutional transfer of property from the federal government to a religious college. That case casts no shadow on the validity of prior Supreme Court cases which squarely find that an injury to a public servant in his official capacity may be a cognizable legal injury for the purposes of standing. In *Coleman v. Miller*,[31] the Supreme Court held that state senators whose votes were unlawfully overridden by illegal action by the state's executive branch had standing to compel a proper record of legislative action under Article V of the Constitution, which governs the power to amend. The Court found that the senators had suffered a cognizable injury in their official capacities. The Court stated, "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution to have their votes given effect."[32] That allegedly unconstitutional injury to official powers conferred standing on the senators. Such is the nature of the appellants' claimed injury in the instant case.

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[30] 511 F.2d 430 (D.C. Cir. 1974); 553 F.2d 190 (D.C. Cir. 1977); 697 F.2d 303 (D.C. Cir. 1982).

[31] 307 U.S. 433, 438 (1939).

[32] *Id.* at 438. *See also Baker v. Carr*, 369 U.S. 186, 208 (1962).

When the concurrence argues that the federal courts lack power to adjudicate claims involving injury to legislators and other public officials by the unlawful deprivation of their constitutional powers and rights, it is really making a political question argument in the guise of standing analysis. The concurrence not only imports political question doctrine wholesale into standing principles, but in so doing it also greatly expands the concept of nonjusticiable political questions. While disputes under certain provisions of the Constitution may be nonjusticiable political questions committed to a coordinate branch of government, the mere fact that a case involves an unlawful deprivation of a legislator's powers by members of a coordinate branch of government does not automatically deprive the federal courts of power to adjudicate the claim.

The Supreme Court has implicitly held that issues under the Origination Clause are *not* nonjusticiable political questions, by the Court's adjudication of several challenges to revenue acts brought under the Origination Clause.[33] The concurrence attempts to accomplish under the rubric of "standing" what the Supreme Court has rejected in its prior decisions. Indeed the concurrence concedes that its so-called "standing" analysis turns on the nature of the claim—which it defines here as "legislative powers"—and not on the identity of the parties.[34] Because *any* claim under the Origination Clause, including one brought by a private taxpayer, will necessarily pertain to the exercise of legislative power, under the concurrence's "standing" analysis, no one will ever have standing to sue for such an alleged constitutional violation.

Thus, in its application to the instant case, the concurrence's approach attempts an end-run around prior

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[33] *See supra* note 3.

[34] *See* concurring op. at n.2.

Supreme Court cases which found such issues justiciable. As applied to other cases, the concurrence's approach, by its extreme expansion of the political question doctrine in the context of standing analysis, would greatly curtail the exercise of federal court jurisdiction over matters that touch upon a coordinate branch of government.

In addition to alleging an injury in fact sufficient to support standing, appellants have satisfied the other requirements of standing. The alleged injury to appellants is within the zone of interests protected by the Origination Clause.[35] Similar constitutional provisions governing the process of enacting legislation or establishing privileges or duties for one of the houses of Congress have been interpreted to protect the interests of individual members of Congress. In *Kennedy v. Sampson* and in *Goldwater v. Carter* we found that the interests of individual legislators were within the zone of interests protected by constitutional provisions that granted rights to the House or the Senate similar to the legislative prerogative given to the House by the Origination Clause.[36]

Furthermore, the appellants satisfy the third requirement of standing which requires that the injury alleged be traceable to the challenged actions of the defendants. The defendants' actions permitted TEFRA to originate improperly in the Senate according to the facts alleged by appellants in their complaint. That the House as a body could have prevented the enactment of TEFRA after its allegedly unlawful origination in the Senate does not deprive the individual members of the House of stand-

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[35] The zone of interests requirement examines the connection between the alleged injury to plaintiffs and the interests protected by the relevant statute or constitutional provision. *See Community Nutrition Institute v. Block*, 698 F.2d 1239, 1249, *cert. granted*, 104 S. Ct. 480 (1983).

[36] *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). *See supra* TAN 25-27.

ing to sue. The unwillingness of a majority of the members to reject TEFRA after the allegedly unconstitutional origination of the bill in the Senate cannot deprive the appellants—minority members of the House—of their right to participate in a constitutionally prescribed method of enacting revenue-raising legislation.

Finally, the injury alleged here is capable of redress by the Judiciary, thereby satisfying the fourth requirement of standing as stated by the Supreme Court in *Valley Forge*.[37] Judicial remedies such as declaratory and injunctive relief for the claimed unlawful conduct are within the court's judicial power and thus the court is capable of remedying the violation alleged here. The appellants have standing to maintain this action.

## III. Remedial Discretion

The fact that the appellants have satisfied the constitutional requirements for standing, however, does not end our inquiry into separation-of-powers issues. While the separation-of-powers concerns presented by this case do not deprive the court of power to adjudicate under Article III—a result the concurrence would reach under the rubric of standing—they may affect the proper exercise of judicial discretion to grant or withhold declaratory relief for the stated claim. Consideration of these issues separately under the doctrine of remedial discretion permits the court to exercise judicial self-restraint in particular matters intruding upon a coordinate branch of government, and avoids both distorting the constitutional requirements for standing articulated by the Su-

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[37] 454 U.S. 464 (1982). *See also Community Nutrition Institute v. Block*, 698 F.2d 1239, 1248-49 (D.C. Cir.), *cert. granted*, 104 S. Ct. 480 (1983) (redressability involves the "connection between the alleged injury and the action requested of the court").

preme Court in recent cases, and rewriting our own decisions on standing.[38]

While we could conceive of judicial remedies to right the wrong claimed here, we affirm the district court's dismissal of this action as a proper exercise of the court's remedial discretion to withhold declaratory relief. Dismissal of the claimants' action is consistent with the doctrine of remedial discretion.[39] It is important to note that the appellants here requested only declaratory relief. Declaratory relief is discretionary with the Court, and it may be denied when prudential considerations counsel against its use. In *Winpisinger v. Watson*, this court noted that declaratory relief should be denied when it will not serve a useful purpose.[40] And in *Lampkin v. Connor*, we affirmed the dismissal of plaintiffs' claim

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[38] *See* McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

[39] Appellees also contended that the Speech or Debate Clause, U.S. CONST., Art. I, § 6, cl. 1, requires dismissal of this action. We need not decide whether the Speech or Debate Clause protects the appellees in this case from suit for the claimed unlawful actions. Our treatment of this issue is in accord with *Davis v. Passman*, in which the Supreme Court stated that Speech or Debate issues should generally be addressed before the merits of the case are litigated. 442 U.S. 228, 235 n.11 (1979). Because we affirm dismissal of the appellants' claim at the threshold of litigation, we have relieved appellants of the burden of defending themselves on the merits of the case. We need not, therefore, inquire into the extent of constitutional immunity from suit afforded by the Speech or Debate Clause. *See Vander Jagt v. O'Neill*, 699 F.2d 1166, 1171 n.8, *cert. denied*, 104 S. Ct. 91 (1983). Furthermore, we should avoid deciding "questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton v. United States*, 196 U.S. 283 (1905); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936) (Brandeis, J., concurring).

[40] 628 F.2d 133, 141 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980).

because, as a prudential matter, granting declaratory relief would be unwise.[41]

The principle that a meritorious plaintiff is not automatically entitled to declaratory relief regardless of the availability of other forms of relief is not a new one in the federal courts. In *Brillhart v. Excess Insurance Co.*, Justice Frankfurter, writing for the Court, upheld a district court's dismissal of an action for declaratory relief as a proper exercise of the court's discretion to decline to afford declaratory relief.[42] Although the district court had jurisdictional power to hear the case, the Court held that federalism concerns properly counseled restraint in affording declaratory relief to the parties before the court. Likewise, in *Wilderness Society v. Morton* [43] this court, sitting *en banc*, declined to afford declaratory relief to a plaintiff challenging the legality of action by an administrative agency. Despite the existence of jurisdiction to decide the merits, not a single judge dissented from the holding that the court should exercise its "judicial discretion to dismiss the action without a determination on the merits." [44] The *en banc* court noted that the issuance of a declaratory judgment is discretionary and that where a case involves "difficult questions concerning the relationship between the legislative and executive branches," that discretion may be properly exercised by declining to grant declaratory relief.[45] Such an exercise of discretion may be proper, even if, as in that case, no other form of relief was requested or granted for the stated claim.

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[41] 360 F.2d 505 (D.C. Cir. 1966).

[42] 316 U.S. 491 (1942). *See also Samuels v. Mackell*, 401 U.S. 66 (1971); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1238 (1969).

[43] 479 F.2d 842 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973).

[44] *Id.* at 886.

[45] *Id.* at 887.

The exercise of this judicial discretion in actions by congressional plaintiffs for declaratory relief has given the courts the needed flexibility to consider separation-of-powers concerns in determining whether relief properly should be granted, without impairing clarity of standing analysis. In *Riegle v. Federal Open Market Committee*,[46] this court affirmed the dismissal of a senator's suit challenging the constitutionality of the Federal Reserve Act. That act requires that five of the twelve members of the Federal Open Market Committee ("FOMC") be elected by the Board of Directors of the Federal Reserve Banks, without the advice and consent of the Senate, and they must be presidents or first vice-presidents of those banks. Senator Riegle argued that this selection process violated his rights under the Appointments Clause and he sought to enjoin the five Federal Reserve Bank members of the FOMC from voting. Although we held that Senator Riegle had standing to sue, prudential concerns led us to affirm dismissal of the action. First, Senator Riegle's dispute was primarily with other members of Congress, and he "could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute." [47] Second, private plaintiffs had standing to challenge the statute, affording a opportunity for review of the statute in a setting where separation-of-powers concerns were less acute. We concluded that when a congressional plaintiff's dispute is primarily with other members of Congress and when private plaintiffs would have standing to challenge the allegedly unconstitutional conduct, the doctrine of remedial discretion counsels judicial restraint in affording the congressional plaintiff declaratory or injunctive relief.

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[46] 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

[47] *Id.* at 811.

[48] 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 104 S. Ct. 91 (1983).

This court reaffirmed those principles in *Vander Jagt v. O'Neill.*[48] In that case, congressional plaintiffs sued members of the House, seeking a judicial determination that the committee appointments system employed by the House leadership was unconstitutional. The court held that the plaintiffs had standing to sue but that the suit should be dismissed for prudential considerations. It noted that respect for a coordinate branch of government counseled restraint in the exercise of the court's remedial powers. And recently in *Crockett v. Reagan*, we affirmed the dismissal of a congressional plaintiff's challenge to congressionally approved aid to El Salvador, on the ground that dismissal was a proper exercise of the court's remedial discretion to withhold relief.[49]

Prudential considerations present in those suits prompted judicial restraint in the exercise of the federal court's remedial powers under Article III. Congressional actions pose a real danger of misuse of the courts by members of Congress whose actual dispute is with their fellow legislators. We are reluctant to meddle in the internal affairs of the legislative branch, and the doctrine of remedial discretion properly permits us to consider the prudential, separation-of-powers concerns posed by a suit for declaratory relief against the complainant's colleagues in Congress.[50]

In the instant case, the appellants' dispute over the origination of TEFRA is primarily a controversy with other members of Congress. As in *Riegle*, *Vander Jagt*, and *Crockett*, this factor counsels restraint in the exercise of our remedial powers. Here, the appellants seek to vindicate their rights by asking us to declare TEFRA a nullity, but, as in *Riegle*, those rights can be vindicated

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[49] 720 F.2d 1355 (D.C. Cir. 1983).

[50] *See generally*, McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

by congressional repeal of the statute. Furthermore, we note that private taxpayers have been found to have standing to challenge the constitutionality of TEFRA under the Origination Clause, so the issue will not go unresolved.[51] Given the separation-of-powers concerns posed by this suit, we find that the district court was properly reluctant to exercise its remedial powers to grant the appellants the declaratory relief requested.

## IV. Conclusion

We conclude that the congressional appellants have standing to challenge the constitutionality of TEFRA under the Origination Clause. We affirm the district court's dismissal, however, as a proper exercise of the court's discretion to withhold declaratory relief for prudential reasons. Accordingly, the judgment of the district court is

*Affirmed.*

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[51] *See Armstrong v. United States* (S.D. Cal. 2 September 1983) (mem.); *Frent v. United States*, 571 F. Supp. 739 (E.D. Mich. 1983).

SCALIA, *Circuit Judge, concurring in result*: The chancellor's foot has never been considered a particularly satisfactory unit of measure, even for matters of relatively small public consequence. It is regrettable to see it applied, now for the fourth time in a panel opinion of this court, as a substitute for the doctrine of standing in marking off the separation of powers. I write separately because, while agreeing that we should abstain from deciding this dispute, I view that abstention to be the result not of our discretion but of constitutional command. As the District Court correctly found, these plaintiffs have no standing to press their grievance before this Branch.

## I. STANDING

This is not a suit between two individuals regarding action taken by them in their private capacities; nor a suit between an individual and an officer of one or another Branch of government regarding the effect of a governmental act or decree upon the individual's private activities. It is a purely intragovernmental dispute between certain members of one house of the Legislative Branch and—in decreasing order of proximity—(1) their own colleagues, (2) the other house of the same Branch, and (3) the Executive Branch, concerning the proper workings of the Legislative Branch under the Constitution. Such a dispute has no place in the law courts.

The majority opinion's discussion of the nature of the doctrine of standing begins with the quotation that the doctrine requires the claimant to "allege such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Maj. op. at 7. This is a quotation from *Baker v. Carr*, 369 U.S. 186, 204 (1962), which described that requirement as "the gist of the question of standing," *id.* The same excerpt was quoted by the Supreme Court in *Flast v.*

*Cohen*, 392 U.S. 83, 99 (1968), with the further elucidation that:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to judicial interference in areas committed to other branches of the Federal Government. . . . [I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.

*Id.* at 100-01. If the constitutional content of the doctrine of standing were indeed so limited, the majority's disposition of this issue might be correct. In fact, however, the *Baker-Flast* approach to standing has been repudiated by later Supreme Court cases, which affirm that the doctrine is meant not merely to assure our ability to appraise issues, through presence of the historically customary "concrete adverseness," *Flast*, *supra*, 392 U.S. at 101, but is rather "founded in concern about the proper—and properly limited—role of the courts in a democratic society," *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and has a special function as a "precondition" to "[t]he exercise of judicial power [which] affects relationships between the coequal arms of the National Government," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982).

The majority opinion acknowledges that "[s]uits against coordinate branches of government by congressional plaintiffs pose separation-of-powers concerns which may affect a complainant's standing." Maj. op. at 8. Despite this recognition, however, the test of congressional standing that the majority proceeds to apply seems to me entirely lacking in relevant separation-of-powers content: "[We have] insisted that congressional complain-

ants clearly allege a concrete injury in fact to a specific legal interest," *id.* at 9, rather than "generalized, amorphous injuries," *id.* at 8. Here, we are told, the appellant's claimed injury "does not descend to the level of being a subjective, amorphous grievance of the legislators' diminished effectiveness," *id.* at 10, but is rather "specific and concrete [injury]," *id.*, to "an interest positively identified by the Constitution, which mandates a specific procedure by which a revenue-raising bill shall become law," *id.* at 9. All this may have much to do with the strength of appellants' claim on the merits; or with the question whether their complaint should have been dismissed for vagueness; but I fail to see how it significantly affects whether our acting in this case will produce a greater or lesser disruption of the separation of powers. To the contrary, it seems to me that setting ourselves up as arbiters of this internal dispute over whether the House may, if it wishes, accept tax legislation allegedly originated in the Senate, is much more disruptive than resolution of the more "vague and generalized" legislator challenge to the CIA's expenditure of funds not appropriated and accounted for as constitutionally required, which we found nonjusticiable in *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977). The irrationality of the test is well enough demonstrated by *American Federation of Government Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982), where we held that a congressman did *not* have standing to challenge an agency's disregard of a committee-veto provision in his capacity as a member of the House, but *did* have standing as a member of the relevant committee. It is impossible to discern how there is any difference between the two, insofar as concerns the degree to which our resolution of the dispute would intrude into the workings of the other branches.

What has happened is that our opinions have mechanically extended the "vague and generalized grievance"

test from an area where it makes sense to an area where it makes nonsense. When a suit by a private citizen is involved, the specificity with which the Constitution or a statute confers a right upon that particular individual as opposed to the citizenry at large does control the standing inquiry, *see, e.g., Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974). This is because in that context it can be said that the courts' "province . . . is, solely, to decide on the rights of individuals," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), whereas relieving "generalized grievances," *Richardson, supra*, 418 U.S. at 176, or protecting "interest[s] common to all members of the public," *Ex parte Levitt*, 302 U.S. 633, 634 (1937), is the business of the political branches. When, however, the plaintiff is himself a member of one of the political branches, and asserts a "right" that consists of the exercise of (or participation in the exercise of) a political power, *the business of the political branches is the very object of the dispute*, no matter with what degree of particularity the "right" has been conferred. As succinctly put in our leading case concerning congressional standing, "[t]he subject matter at stake in this litigation is legislative power." *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974). Since that is so, it is impossible to say that we intrude upon the prerogatives of the Legislative Branch less severely when we resolve, for example, an internal dispute regarding the provision that "[t]he Vice President of the United States shall be President of the Senate," U.S. Const. art. I, § 3, cl. 4, than we do when we resolve an internal dispute regarding the provision that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days," U.S. Const. art. I, § 5, cl. 4, simply because the former confers a "right" upon an individual with more specificity and particularity.

This erroneous test of congressional standing would long since have fallen of its own weight if the doctrine of equitable discretion had not been summoned forth to save us from the unacceptable results it produced. I will say more of that construct later, but for the moment I must note how strange it is that a doctrine (the doctrine of standing) "*founded in concern*" for the separation of powers, *Warth v. Seldin*, *supra*, 422 U.S. at 498 (emphasis added), should now have yielded, four times within the last four years, and thrice within the last year, a result so repugnant to the separation of powers that we have had to exercise our supposed equitable powers to forestall it. See, in addition to the present case, *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 104 S. Ct. 91 (1983); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983). Any scientific theory which required this kind of adjustment would be pronounced useless and discarded. What does it take, one wonders, to arouse judicial suspicions that a legal theory is wrong?

The only test of congressional standing that is both consistent with our constitutional traditions and susceptible of principled application (*i.e.*, an application undistorted by the *ad-hoc*ery of "remedial discretion") must take as its point of departure the principle that we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings, or the resolution of those inter-branch disputes through the system of checks and balances ("[a]mbition . . . counteract[ing] ambition," THE FEDERALIST No. 51, at 349 (Madison) (J. Cooke ed. 1961)) brings forth a result that harms private rights, it is no part of our constitutional province, which is "solely, to decide on the rights of individuals," *Marbury v. Madison*, *supra*, 5 U.S. (1

Cranch) at 170. As the cases that have been brought before us since *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973), demonstrate, that principle is reduced to meaninglessness, and the system of checks and balances replaced by a system of judicial refereeship, if the officers of the political branches are deemed to have a personal, "private" interest in the powers that have been conferred upon them (whether specifically or vaguely) by Constitution or statute. Unless those powers have been denied in such fashion as to produce a *governmental result* that harms some entity or individual who brings the matter before us, we have no constitutional power to interfere.

In my view no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold. Whatever the realities of private ambition and vainglory may be, in contemplation of law their personal interest in full and unfettered exercise of their authority is no greater than that of all the citizens for whose benefit (and not for the personal benefit of the officeholder) the authority has been conferred. They have a private right to the office itself, *see Marbury v. Madison*, *supra*, and to the emoluments of the office, *see Powell v. McCormack*, 395 U.S. 486 (1969); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935): but the powers of the office belong to the people and not to them.[1]

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[1] I do not assert that this is either a law of nature or a scientific description of the "real world." It is a conceptualism that reflects, and facilitates application of, the doctrine of separation of powers. It is not necessarily extendible, therefore, to the governmental powers of state officers, which are not insulated from our scrutiny by that doctrine. *See Coleman v. Miller*, 307 U.S. 433 (1939). For an analogous situation where the rules of standing differ in federal versus state-and-local cases, *compare Frothingham v. Mellon*, 262 U.S. 447 (1923), denying, on separation of powers grounds, federal

If this were not so, we would be besieged with lawsuits, not only on the part of congressional plaintiffs seeking full recognition of their powers by their congressional colleagues and by the Executive Branch, but also on the part of executive officers, asking us rather than the President to resolve conflicts in their authorities, or even challenging presidential resolution. I do not say we cannot reach such issues; but we do so in the context of a complaint that irregular process has produced legislative or executive action or inaction that harms the plaintiff, *see INS v. Chadha*, 103 S. Ct. 2764 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976), and not through a supervisory inquiry into the process itself on the theory that each of its official participants has a personal "right" to performance of his constitutionally or statutorily assigned role. To put the point slightly differently: a proper understanding of the doctrine of separation of powers suggests that the personal desires of legislative and executive officers to exercise their authority are not within the "zone of interests" protected by the provisions of the Constitution and laws conferring such authority. *See Valley Forge, supra*, 454 U.S. at 474. Only the interests of particular individuals who would be aided by the exercise of that authority—and have been harmed by its unlawful deprivation—come within that zone, since the authority was conferred for the benefit not of the governors but of the governed.[2]

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taxpayer standing to challenge federal expenditures, *with Crampton v. Zabriskie*, 101 U.S. 601 (1880), granting county taxpayer standing to challenge county board expenditures.

[2] The article by Judge McGowan relied upon by the majority, Maj. op. at nn.38 & 50, asserts that "[s]tanding, although reflecting a desire for judicial restraint, does not address the separation-of-powers concerns inherent in any suit by a legislator against the Executive Branch," since "standing has always been thought of as turning upon the relationship of plaintiff to claim, not upon the relationship of plaintiff to de-

Despite what seems to me the obvious (and, in light of the frequent invocation of equitable discretion, self-confessed) inadequacy of the standing test applied by the majority, I would not be disposed to question it if the law of this circuit on the subject of congressional standing were stable and seemed, by reason of the failure to review it, to have the tacit approval of the Supreme Court. Neither is true. In addition to the fact that the recently devised sky-hook of equitable discretion is a revision of our standing doctrine under another name, even without that development our holdings in this field have displayed a notable inconsistency. The panel opinion in *Harrington v. Bush*, *supra*, 553 F.2d at 207-09, abandoned the holding on standing of *Mitchell v. Laird*, *supra*, which had been decided only four years earlier. *Riegle v. Federal Open Market Committee*, *supra*, is flatly inconsistent with the reasoning of *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978), which involved precisely the same issue (a congressman's challenge to the allegedly unconstitutional composition of the Federal Open Market Committee of the Federal Reserve System).[3] Moreover, largely through application of the doctrine of equitable discretion, with one exception all of our decisions in this field since *Kennedy v. Sampson* have awarded

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fendant that is so troublesome here." McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 255 (1981). It seems to me, however, that it is not the relationship of plaintiff to defendant that gives trouble in these cases. There is no problem in entertaining a suit by a congressman against the Executive Branch for a tax refund, or by a congressman against the Speaker of the House for breach of a commercial contract. It is precisely the "nature of the claim" that gives difficulty—that is, a claim pertaining to the congressman's exercise of legislative powers.

[3] The factor which *Riegle* asserts explains *Reuss*'s contrary holding, *see* 656 F.2d at 879 n.7, is not even mentioned in the portion of *Reuss* dealing with legislator standing, 584 F.2d at 465-68.

judgment *for* the party that was challenging standing, so that there has been no ability to seek Supreme Court review on that point.[4] The exception was *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc), which can hardly be considered to represent tacit Supreme Court approval of our course, since *certiorari* was accepted and the judgment was vacated on other jurisdictional grounds, 444 U.S. 996 (1979). The Supreme Court itself, of course, has never found standing to resolve, or reached the merits of, an intra- or inter-branch dispute presented by a federal officer whose only asserted injury was the impairment of his governmental powers.[5]

Our leading case involving congressional litigation, and the only unvacated case in which our finding of standing made any difference to the outcome, is *Kennedy v. Sampson*. It was based upon the premise that " 'the gist of the question of standing' " is whether the plaintiff has " 'alleged such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness,' " 511 F.2d at 435, *quoting from Baker v. Carr*, 369 U.S. 186, 204 (1962). As discussed above, that view of the doctrine, which isolates it from major separation-of-powers concerns, has been revised by later Supreme Court cases, which acknowledge that standing is "founded in concern about the proper—and properly limited—role of the

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[4] In *Kennedy v. Sampson*, itself, *certiorari* could have been sought but was not.

[5] In the Supreme Court's disposition of *Goldwater v. Carter*, *supra*, only the dissent of Justice Brennan reached the standing issue—and that only by implication, since it proceeded directly to the merits. The Court's summary affirmance of *Pressler v. Blumenthal*, 434 U.S. 1028 (1978), could, as Justice Rehnquist's concurrence noted, "rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question as it could on agreement with the District Court's resolution of the merits of the question." *Id.* at 1029.

courts in a democratic society," *Warth v. Seldin*, *supra*, 422 U.S. at 498. *Kennedy* is no longer good law.[6]

## II. Remedial Discretion

As noted earlier, the theory of congressional standing with which I have taken issue here has displayed one flaw

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[6] The majority claims that the foregoing analysis of legislator standing "really mak[es] a political question argument in the guise of standing analysis," Maj. op. at 13, and thereby "attempts an end-run around prior Supreme Court cases which found [origination clause] issues justiciable," *id.* at 13-14. That is not so. The conclusion of the analysis is not that the issue of whether a tax bill originated in the House of Representatives is nonjusticiable (a private party injured by the resulting legislation can litigate it, *see supra* at 6). Rather, the conclusion is that injury to legislative powers is not constitutionally sufficient to enable *these* plaintiffs to bring the issue before us.

It is true, as the majority says, that "*any* claim under the Origination Clause, including one brought by a private taxpayer, will necessarily pertain to the exercise of legislative power," *id.* at 13, but the majority is wrong to conclude from this that "under the concurrence's 'standing' analysis, no one will ever have standing to sue for such an alleged constitutional violation," *id.* A taxpayer suit may "pertain to the exercise of legislative power" in the sense that whether legislative power was exercised properly is relevant to the outcome. But in such a suit the improper exercise of legislative power is not, as it is here, the very *gravamen* of the complaint. The taxpayer complains *that the government is taking his money wrongfully* because the House did not originate the legislation. These plaintiffs complain *that the House did not originate the legislation.*

It is of course correct that the considerations I rely upon to mark out the boundaries of the doctrine of standing are similar to considerations that may invoke the political question doctrine. It could hardly be otherwise, since the principal purpose of both doctrines is to preserve the separation of powers. That no more suggests, however, that the one is the same as the other than the shared purpose of producing economic welfare makes the Sherman Act an "end-run" around the commerce clause.

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in four of its last five applications[7]: it has produced a concededly unacceptable result. Enter the doctrine of "remedial discretion" (in *Riegle* and *Crockett*, *supra*, it is called "equitable discretion," and I shall use the terms interchangeably).

Believing as I do that the Constitution entirely forbids this suit, I can hardly disagree with the proposition that, if we entertain it, we should exercise whatever discretion we possess—equitable, remedial or other—to withhold relief. Considerations adequate to oust our jurisdiction are *a fortiori* adequate to justify our discretionary refusal to act. But the consequences of substituting one approach for the other are significant.

The majority's approach rests upon the following insight of *Riegle v. Federal Open Market Committee*, *supra*, the case which would, in the currently favored hackney, be the "[____ and its progeny]" of this doctrine:

> The most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion. . . . [T]his test avoids the problems engendered by the doctrines of standing, political question, and ripeness.

656 F.2d at 881. It is interesting to speculate how the character of our law would be changed if the wisdom of solving separation-of-powers problems through broad reliance upon equitable discretion had only been comprehended sooner. When Chief Justice Marshall addressed the controversial question whether mandamus[8] could is-

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[7] Since the decision of *Riegle* in 1981, only in *American Federation of Government Employees v. Pierce*, *supra*, have we sustained congressional standing without invoking equitable discretion. Even in that case, of course—as in every unvacated case except *Kennedy*—the finding of standing was inconsequential to the result.

[8] Although mandamus is classed as a legal remedy, its issuance is discretionary, and largely controlled by equitable prin-

sue to so prominent an executive officer as the Secretary of State, he asked (it has always been thought rhetorically):

> [W]hat is there, in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus* . . . ?

*Marbury v. Madison*, *supra*, 5 U.S. (1 Cranch) at 170. Although the Chief Justice was forced to admit that "it is not perceived, on what ground the courts of the country are . . . excused from the duty of giving judgment that right be done," *id.* at 171, we now perceive that the answer is remedial discretion. And when the Chief Justice reached the further separation-of-powers issue whether the Court could declare an Act of Congress unconstitutional, he reasoned:

> It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. . . . [I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty.

*Id.* at 177-78. Had Justice Marshall only known the Turkish delights of remedial discretion, he would have realized that this was not the unavoidable duty of the court at all.

I do not doubt that separation-of-powers considerations can lead to the denial of discretionary relief if other

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ciples. *United States v. Dern*, 289 U.S. 352, 359 (1933); *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 312 (1917).

relief is available. *See Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1977); *cf. Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) (dictum). But where, as here, that ordinary condition to the denial of discretionary relief does not exist—so that the practical effect of denying relief and denying standing is precisely the same—our legal tradition from *Marbury v. Madison* forward suggests that any role for judicial discretion in protecting separation of powers must be an extremely limited one, reserved for unique or at least distinctive factual contexts. It cannot be applied so generally to entire classes of litigation, and on the basis of such factors, as to warrant the overt admission that discretion is an alternative to the doctrine of standing. I know of no precedent for the assertion, which has been made in this *Riegle* line of cases, of a discretion to grant or withhold the only available relief [9]

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[9] With one exception, all of the cases cited in the majority opinion to establish that it is not novel to deny declaratory relief "regardless of the availability of other forms of relief," Maj. op. at 17, involve situations in which alternate relief was not available in the current proceeding *but was available later or elsewhere*—and that factor was important to the courts' analysis. *See Samuels v. Mackell*, 401 U.S. 66, 69-72 (1971); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 494-96 (1942); *Wilderness Society v. Morton*, 479 F.2d 842, 886-87 (D.C. Cir.) (en banc), *cert. denied*, 411 U.S. 917 (1973); *Lampkin v. Connor*, 360 F.2d 505, 511-12 (D.C. Cir. 1966). The one exception is *Winpisinger v. Watson*, 628 F.2d 133 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980), and there it is significant that the discretionary denial of relief was an alternate ground, the first basis being (precisely what one would expect when not-otherwise-available relief is denied without reaching the merits) a jurisdictional one, *viz.*, lack of standing. That first ground, of course, meant that the court had no jurisdiction to speculate upon the second, so it is the weakest of dictum.

The majority confides that it "could conceive of judicial remedies [other than the requested declaratory relief] to right the wrong claimed here," Maj. op. at 16. I cannot. If I could, however (and if I believed there was standing), I would heed the command of Fed. R. Civ. P. 54(c) that "every final judg-

on the basis of a factor that is not accidental or extrinsic but pertains to the identity of the parties and the very nature of the claim. When the impropriety of granting relief derives from such a jurisdictional characteristic, the courts have not hidden behind a massive "remedial discretion," but have admitted their lack of power to rule in favor of the plaintiff because of lack of standing, *see Richardson, supra,* or sovereign immunity, *see Edelman v. Jordan,* 415 U.S. 651 (1974).

As suggested by my earlier reminiscence of *Marbury v. Madison,* one conceivable consequence of expanding the doctrine of equitable discretion to do the duty of standing is that courts will decline to act where they have hitherto acted. However, given the realities of institutional ambition that were the reason for establishing the separation of powers, such untoward self-abnegation is not the major risk. The real risk, the predictable effect and the evident purpose is just the opposite. Under the doctrine of standing, once it is determined that this is a suit by congressmen, against congressmen, pertaining to their respective legislative powers, that is an end of the matter. With remedial discretion, however, while that characteristic of the claim *may* produce judicial abstention it will not necessarily do so. The court will proceed to consider, case by case, whether its involvement would "not serve a useful purpose," Maj. op. at 16, or would be "unwise," *id.* at 17.

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ment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," and the well established principle that a complaint shall not be dismissed for failure to state a claim simply because it demands a form of relief the court cannot grant, if alternative relief the court can grant is available. *See, e.g., Holt Civic Club v. Tuscaloosa,* 439 U.S. 60, 65-66 (1978). If the majority can conceive of relief, it should provide it; and if it cannot it must live with the unpleasant truth that the *Riegle* notion of equity to which it subscribes leaves a whole class of plaintiffs with a right, but no remedy—a situation which equity was created to avoid rather than produce.

While such a regime may quiet judges' fears that we will be compelled to do harm (or to stir up a storm of congressional and popular opposition) by the normal exercise of our powers, it hardly meets the fears that produced the doctrine of separation of powers in the Constitution. Whenever we deal with separation-of-powers concerns affecting the Third Branch, in any context, we are judges in our own cause. But we judge under some constraint when the context is that which I discussed in Part I above—the application of a principled and intelligible doctrine of standing, faithful to our constitutional heritage and (in theory) externally imposed, which reflects separation-of-powers concerns. It is quite another thing to sit in judgment of our own powers in the case-by-case context of determining whether it is "wise" or "useful" for us to intervene in a particular dispute.

All of the factors that are to go into that Solomonic determination (made, alas, by mere ordinary judges) have not yet been established. One factor, however, has been given prominent attention in all the cases, from progenitor *Riegle* to its current offspring: whether, if the requested relief is not afforded, "non-frivolous claims of unconstitutional action would go unreviewed by a court," *Riegle*, *supra*, 656 F.2d at 882—or, as the majority opinion puts it, whether "the issue [of the constitutionality of this statute] will . . . go unresolved," Maj. op. at 20. If such an untoward consequence is likely, the discretionary relief will not be withheld. That single factor displays what a reversal of our legal system is in process: *Marbury* found that since the courts had to decide the case, the constitutionality of the statute had to be reviewed; *Riegle et seq.* find that since the constitutionality of the statute has to be reviewed, the courts must decide the case. *Riegle* justifies this progression by positing a "mandate of the federal courts to 'say what the law is,'" 656 F.2d at 882, *quoting from Marbury v. Madison*, *supra*, 5 U.S. (1 Cranch) at 177. There is of course no such mandate, or else advisory opinions would be proper. As *Marbury*

*v. Madison* makes clear, the duty to "say what the law is" is not an independent mission, as *Riegle* would make it, but only a consequence that attaches when the resolution of private claims (which *is* the court's mandate) requires the court to "apply the rule to particular cases," *id.* Or as the Supreme Court put it in a later case:

> We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. . . . If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. . . . To do [otherwise] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.

*Frothingham v. Mellon*, *supra*, 262 U.S. at 488-89. The majority's view, that it would be proper to entertain the present suit if the constitutionality of this particular statute might otherwise escape judicial scrutiny, should be compared with the Supreme Court's assessment:

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so.. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.

*United States v. Richardson*, *supra*, 418 U.S. at 179. To convert the sometimes inescapable necessity of consider-

ing the validity of statutes into a continuing *mission* to do so; and then to convert standing into equitable discretion as though it makes no great difference, is to toy with the separation of powers.[10]

* * * * *

The majority opinion considers it highly relevant to the denial of discretionary relief that "private taxpayers have been found to have standing to challenge the constitutionality of [the legislation whose process of enactment is at issue here] under the Origination Clause." Maj. op. at 20. The majority would not, I suspect, consider such a factor pertinent in the case of other rights: "Since other parties to this contract have been found to have standing to challenge its validity, the need of this plaintiff for declaratory relief is less compelling." "Since other employees have been found to have standing to seek an injunction against this discriminatory practice, this employee has less need of such relief." The reasoning seems less objectionable here, I think, because we all feel that the "right" of these congressional plaintiffs to originate tax legislation is not really a personal entitlement but a public interest in the regularity of governmental process. That should lead to the conclusion, not that these plaintiffs should be denied equitable relief, but that they have no standing.

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[10] The appealing notion of equitable discretion as a substitute for constitutional prohibition has, predictably, spread to other jurisdictional doctrines:

> The parties attempt to categorize the decision to be made here either as one of "ripeness" or "mootness." We see no reason, however, to pigeonhole our decision in this case into any specific category of nonjusticiability. We believe that "we should exercise our 'judicial discretion to dismiss the action without a determination on the merits'. . . ." . . . *Cf. Riegle v. Federal Open Market Committee.* . . .

*National Wildlife Federation v. Marsh*, 665 F.2d 390, 392 (D.C. Cir. 1981) (citations omitted).

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# APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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**Civil Action No. 82-2318**

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W. HENSON MOORE, *et al.*,
*Plaintiffs,*

v.

THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
*Defendants.*

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**Civil Action No. 82-2352**

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RON PAUL,
*Plaintiff,*

v.

THE UNITED STATES OF AMERICA, *et al.*,
*Defendants.*

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**MEMORANDUM OPINION AND ORDER**

These consolidated cases, before the Court on plaintiffs' motion for summary judgment and defendants' motions to dismiss, present the threshold question whether plaintiffs, 19 members of Congress, have standing to challenge the constitutionality of the "Tax Equity and Fiscal Responsibility Act of 1982," Pub. L. No. 97-248 ("TEFRA"), which the President signed into law on September 3, 1982. Upon consideration of the supporting documentation, the record as a whole and oral arguments presented by the parties, it is determined that plaintiffs

lack standing[1] to maintain these actions and that the actions therefore must be dismissed.

Plaintiffs brought their complaints against the United States,[2] the United States House of Representatives, the United States Senate, and officials of those two bodies, seeking a declaratory judgment that the actions of Congress in enacting TEFRA infringed upon the prerogatives of the House in contravention of the "origination clause" of the United States Constitution, U.S. Const. art. I, § 7, cl. 1. The origination clause provides:

> All Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose and concur with Amendments as on other Bills.

On November 13, 1981, H.R. 4961, denominated "Miscellaneous Revenue Act of 1981," was introduced in the House of Representatives. After certain amendments, the bill was reported out of the House Ways and Means Committee on December 14, 1981. The House Report estimated that the net effect of the tax provisions of the bill would reduce revenues by 976 million dollars over five years. H.R. Rep. No. 404, 97th Cong., 1st Sess. 9 (1981). The bill was passed by the House on December 15, 1981. 127 Cong. Rec. H9607-10 (daily ed., December 15, 1981).

Thereafter, the bill was referred to the Senate Finance Committee, which reported it out on July 12, 1982 under the new name, "Tax Equity and Fiscal Responsibility Act of 1982" (TEFRA). S. Rep. No. 494, 97th Cong., 2d Sess. (1982). Although carrying the House number, the bill that

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[1] For this reason other grounds for dismissal advanced by defendants need not be addressed.

[2] Only plaintiff *Paul* named the United States as a defendant. However, the United States successfully moved to intervene as a defendant in *Moore*.

left the Senate Committee, unlike the bill passed by the House, was designed to raise revenues in the amount of 99 billion dollars over three years. The Senate passed this bill on July 19, 1982. 128 Cong. Rec. S8577-8644 (daily ed., July 19, 1982). The difference between the bill as passed by the Senate and as passed by the House prompted the Senate to seek a conference with the House. 128 Cong. Rec. S9307 (daily ed., July 28, 1982).

In response to the Senate's request, plaintiff Rousselot offered this privileged resolution:

> *Resolved*, that the Senate Amendments to the bill, H.R. 4961, in the opinion of the House, contravene the first clause of the seventh section of the first article of the Constitution of the United States, and are an infringement of the privileges of this House and that the said bill, with amendments be respectfully returned to the Senate with a message communicating this resolution.

128 Cong. Rec. H4776 (daily ed., July 28, 1982). Representative Dan Rostenkowski, Chairman of the Committee on Ways and Means, immediately moved to table the resolution, with 229 members voting yea, 169 voting nay and 36 not voting. Each of the plaintiffs voted against the motion to table. *Id.* at H4776-77. At the direction of this committee, Representative Rostenkowski then moved to send the bill to conference with the Senate. *Id.* at H4777. This motion passed after debate, which included plaintiffs, on the constitutionality of the Senate amended bill. 128 Cong. Rec. H4777-88 (daily ed., July 28, 1982). Each of the plaintiffs voted against the motion to go to conference. *Id.* at H4786-87.

During the following two weeks the constitutional issue was addressed by several Representatives. *See* Statements of Representative Bereuter, 128 Cong. Rec. E3636-37, E3652 (daily ed., Aug. 3, 1982); Representative Dreier, 128 Cong. Rec. E3807 (daily ed., August 11,

1982); Representative Porter, 128 Cong. Rec. E3888 (daily ed., Aug. 13, 1982). On August 17, 1982, a conference bill was reported, substantially similar to the Senate version but including two tax provisions of the House version which the Senate had deleted. *Conference Report to Accompany H.R. 4961*, H.R. Rep. No. 760, 97th Cong., 2d Sess. 267-68 (1982). Plaintiffs in *Moore* promptly filed suit on August 18, 1982.

The next day the constitutional issue was debated further on the House floor. 128 Cong. Rec. H6555 (daily ed., Aug. 19, 1982). Plaintiff Rousselot introduced a second resolution to have the bill returned to the Senate. 128 Cong. Rec. H6555 (daily ed., August 19, 1982). This resolution was also rejected, with 268 members voting yea, 144 voting nay and 22 not voting, in favor of a motion to table. Each of the plaintiffs voted against this motion. 128 Cong. Rec. H6555-6636 (daily ed., Aug. 19, 1982). The bill was passed by both Houses on August 19, 1982, 128 Cong. Rec. S10946, H6635-36 (daily ed., Aug. 19, 1982), with each of the plaintiffs exercising their voting rights on this legislation. Plaintiff Williams voted in favor of passage. All other plaintiffs voted against passage. *Id.* at H6635-36. Plaintiff Paul filed his action on August 20, 1982. On September 3, 1982, President Reagan signed the bill into law.

When voting on a motion to dismiss for want of standing the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). However, even assuming the legal conclusion[3] that TEFRA was enacted in violation of the

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[3] In its response to plaintiffs' opposition to defendants' motion to dismiss, the United States rightly points out that "standing in no way depends on the merits of plaintiffs' contention that particular conduct is illegal." *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).

origination clause of the Constitution, plaintiffs have not demonstrated the injury-in-fact required by Art. III to invoke the judicial power. At a minimum, a plaintiff must show that he personally has suffered an actual or threatened injury which reasonably can be traced to the challenged conduct of the defendant and would likely be redressed by a favorable decision. *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 459 U.S. ____, 102 S. Ct. 752, 758 (1982).

> In this manner does Art. III limit the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."

*Id.* (quoting *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968)). Thus, a court should refrain from adjudicating the constitutionality of an act of a co-equal branch of government unless the complaint has suffered a cognizable injury. *Id.* at 759.

This separation of powers concerns which underlie the concept of standing are particularly acute when plaintiffs are members of Congress. Although "there are no special standards for determining Congressional standing questions," *Harrington* v. *Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977) (emphasis deleted), injury-in-fact for a congressional plaintiff "must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity." *Goldwater* v. *Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (*en banc*), *vacated on other grounds*, 444 U.S. 996 (1979) (*mem.*). *Riegle* v. *Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 636 (1982); *Reuss v. Balles*, 584 F.2d 461, 467 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978); *see also Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

As the legislative history plainly reflects, plaintiffs had ample opportunity to exercise their voting rights and in fact, save for plaintiff Williams, voted their disapproval of TEFRA at every turn. Plaintiffs fully participated in the legislative process which culminated in the passage of the act they now challenge. They were simply outvoted. The argument that plaintiffs' votes were effectively nullified by the Senate's usurpation of their right to originate revenue raising bills, and the House acquiescence therein, is unpersuasive. To support this contention, plaintiffs rely on *Kennedy* v. *Sampson*. In that case, however, the plaintiff had standing because his successful vote had been nullified by the allegedly illegal pocket veto of the President. But where, as in this case, "Congress itself, and not the Executive, renders any individual legislator's vote ineffective, the courts have no role." *Goldwater* v. *Carter*, 617 F.2d at 712. *See also Korioth* v. *Briscoe*, 523 F.2d 1271, 1278 (5th Cir. 1975) (state legislator denied standing to challenge the validity of a statute passed over his objective vote); *McClure* v. *Carter*, 513 F. Supp. 265, 270 (D. Idaho), *aff'd mem. sub nom.*, *McClure v. Reagan*, 102 S. Ct. 559 (1981) ("Certainly no one would contend . . . that the losing senators in any vote should automatically have the right to appeal to a federal court for a determination of the correctness of the result approved by a majority of their colleagues").

In short, plaintiffs speak as a frustrated minority. Unless the institution of Congress itself has suffered injury-in-fact at the hand of the Executive, an individual legislator has no standing to complain of impairment to the effectiveness of his vote. "His injury can only be derivative." *Goldwater* v. *Carter*, 617 F.2d at 712. Here, Congress specifically considered and rejected the suggestion of any constitutional infirmities in the enactment of TEFRA, and in fact opposes this lawsuit. Judicial in-

terference into this intra-legislative dispute is constitutionally precluded.

Even if plaintiffs' claim of injury to their rights as members of Congress to originate bills for raising revenue could be deemed constitutionally sufficient to confer standing, the doctrine of equitable discretion announced by this Circuit in *Riegle* v. *Federal Open Market Committee* squarely governs this action and mandates dismissal.

In *Riegle* an individual senator challenged the constitutionality of the section[4] of the Federal Reserve Act which provides for the election of five representatives to the Federal Open Market Committee by the Board of Directors of the Federal Reserve Banks, claiming that the selection of these individuals without submission of their nominations to the Senate deprived him of his constitutional right[5] to advise and consent regarding the appointment of these United States officers. Declining to distinguish between Congressional and private plaintiffs,[6] the court determined that Senator Riegle had standing. Nevertheless, the fundamental constitutional principle of separation of powers required that his action be dismissed. Because suits by Congressmen present "the possibility of thwarting Congress' will by allowing a plaintiff to circumvent the process of democratic decisionmaking," a court should, as a matter of equitable discretion, dismiss a Congressman's action where he "could obtain substantial relief from his fellow legislators

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[4] 12 U.S.C. § 263(a)(1976).

[5] U.S. Const. art. II, § 2 ("appointments clause").

[6] *See generally*, McGowan, *Congressmen in Court: The New Plaintiffs*, 15 Ga. L. Rev. 241 (1981).

through the enactment, repeal, or amendment of a statute." *Riegle* v. *Federal Open Market Committee*, 656 F.2d at 881. Application of the *Riegle* doctrine is especially appropriate where a plaintiff's dispute is not with the executive branch but with his fellow legislators. *See Reuss* v. *Balles*, 584 F.2d at 468. In this way a court may avoid intrusion into the internal functioning of the legislative branch.

In the instant case, plaintiffs must be relegated to their legislative remedies, despite their previous failures to convince their colleagues of the rightness of their views, and no matter how remote their chances for success in the future. "It would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle." *Riegle* v. *Federal Open Market Committee*, 656 F.2d at 882.

Before dismissing an action under the *Riegle* doctrine a court must also inquire whether "a similar action could be brought by a private plaintiff." *Id.* Although the *Moore* plaintiffs refuse to discuss this part of the analysis, and refer to it as "baggage", *Moore* plaintiffs' memorandum in opposition to defendants' motion to dismiss at 26, plaintiff Paul argues that "[i]n this instance a private plaintiff has no immediate redress." Plaintiff Paul's opposition to defendants' motions to dismiss at 5. Yet, Representative Paul acknowledges that a taxpayer could challenge the constitutionality of TEFRA by filing for a refund after January 1, 1983. *Id.* Private taxpayer plaintiffs have asserted claims under the origination clause before. *See Rainey* v. *United States*, 232 U.S. 310 (1914); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911); *Miller* v. *Roberts*, 202 U.S. 429 (1906); *Twin City Bank* v. *Nebeker*, 167 U.S. 196 (1897); *Bertelson v. White*, 65 F.2d 719 (1st Cir. 1933);

*Hubbard* v. *Lowe*, 226 F. 135 (S.D.N.Y. 1915), *appeal dismissed*, 242 U.S. 654 (1916).

It is, accordingly, this 16th day of December, 1982

ORDERED, that plaintiffs' motion for summary judgment be and it hereby is denied; and it is

FURTHER ORDERED that defendants' motions to dismiss be, and they hereby are, granted, and that these actions stand dismissed.

Joyce Hens Green
JOYCE HENS GREEN
United States District Judge

Office - Supreme Court, U.S.
FILED
NOV 30 1984
ALEXANDER L. STEVAS
CLERK

No. 84-389

# In the Supreme Court of the United States

OCTOBER TERM, 1984

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W. HENSON MOORE, U.S. REPRESENTATIVE, SIXTH DISTRICT, LOUISIANA, ET AL., PETITIONERS

*v.*

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

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## QUESTION PRESENTED

Whether petitioners' status as Members of the United States House of Representatives entitled them to challenge the constitutionality of an Act of Congress on the ground that it was a "Bill[] for raising Revenue" that did not "originate in the House of Representatives" (Art. I, Sec. 7, Cl. 1), when the House passed the bill over petitioners' opposition and despite their repeated constitutional objections.

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# In the Supreme Court of the United States

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W. HENSON MOORE, U.S. REPRESENTATIVE, SIXTH DISTRICT, LOUISIANA, ET AL., PETITIONERS

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 733 F.2d 946. The opinion of the district court (Pet. App. 38a-46a) is reported at 553 F. Supp. 267.

### JURISDICTION

The judgment of the court of appeals was entered on May 4, 1984. A petition for rehearing was denied on June 29, 1984. The petition for a writ of certiorari was filed on September 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. In November 1981, H.R. 4961, a bill entitled the Miscellaneous Revenue Act of 1981, was introduced in the House of Representatives during the 97th Congress. Pet.

App. 39a. As introduced, the bill contained several provisions amending the Internal Revenue Code. On December 14, 1981, H.R. 4961 was reported out of the House Committee on Ways and Means with certain additions,[1] and it was passed by the House on the following day. 127 Cong. Rec. H9607-H9617 (daily ed. Dec. 15, 1981). The Congressional Budget Office cost estimate on H.R. 4961 was that the immediate effect of the bill would be a net reduction in tax revenues. H.R. Rep. 97-404, 97th Cong., 1st Sess. 41-43 (1981).

H.R. 4961 was referred to the Senate Finance Committee and was reported out of that Committee on July 12, 1982, with extensive amendments. It passed the Senate with further amendments on July 19, 1982. 128 Cong. Rec. S5877-S8644 (daily ed.). The bill as amended by the Senate was expected to increase tax revenues significantly over a five-year period. See S. Rep. 97-494, 97th Cong., 2d Sess. 100-106 (1982). Because of the differences between the bill as passed by the Senate and as passed by the House, the Senate requested a conference. 128 Cong. Rec. S9307, H4776 (daily ed. July 28, 1982).

In response to the Senate's request, petitioner Representative Rousselot offered a "privileged resolution" (H.R. Res. 541, 97th Cong., 2d Sess. (1982)) regarding the bill's

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[1]All but one of the bill's sections concerning tax provisions had already been the subject of hearings in conjunction with previously introduced House bills. See *Legislative Proposals Relating to Section 280A and Other Minor Tax Bills: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. H9610 (daily ed. Dec. 15, 1981) (remarks of Rep. Rostenkowski).

validity under the Origination Clause of the Constitution,[2] and sought its immediate consideration. 128 Cong. Rec. H4776 (daily ed. July 28, 1982). The resolution stated in full:

> *Resolved,* that the Senate Amendments to the bill, H.R. 4961, in the opinion of the House, contravene the first clause of the seventh section of the first article of the Constitution of the United States, and are an infringement of the privileges of this House and that the said bill, with amendments be respectfully returned to the Senate with a message communicating this resolution.

A motion to table the resolution was made immediately and was adopted on a roll call vote of 229 to 169. *Ibid.* All the petitioners, who were members of the House of Representatives, participated in the vote on the resolution and voted on the losing side. *Id.* at H4776-H4777.

Chairman Rostenkowski of the House Ways and Means Committee then moved, at the Committee's direction, to take H.R. 4961 from the Speaker's desk and to agree to the conference requested by the Senate. 128 Cong. Rec. H4777 (daily ed. July 28, 1982). The members of the House debated this motion and further considered whether the Senate-amended bill was in compliance with the Origination Clause. *Id.* at H4777-H4786. During the debate, various Representatives (including four of the petitioners) opposed the conference motion on constitutional grounds. See *id.* at H4778-H4779 (remarks of Rep. Moore); *id.* at H4781 (remarks of Rep. Rousselot); *id.* at H4781-H4782 (remarks of Rep. Crane); *id.* at H4783 (remarks of Rep.

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[2]The Origination Clause (Art. I, § 7, Cl. 1) states: "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills."

Martin). A roll call vote was taken, and the motion to send the bill to conference was passed by a vote of 208 to 197. *Id.* at H4786-H4787. Again, each petitioner voted but was on the losing side. *Ibid.*[3] Over the next two weeks, several House Members raised the Origination Clause issue at various times. See 128 Cong. Rec. E3636-E3637 (daily ed. Aug. 3, 1982) (statements of Rep. Bereuter); *id.* at E3807 (daily ed. Aug. 11, 1982) (statement of Rep. Dreier); *id.* at E3888 (statement of Rep. Porter).

When the Conference Report on this legislation (H.R. Conf. Rep. 97-760, 97th Cong., 2d Sess. (1982)) was presented to the House, the question of compliance with the Origination Clause was again raised and debated. Petitioner Representative Moore informed his colleagues that he had filed this action in the United States District Court for the District of Columbia challenging the validity of the bill (128 Cong. Rec. H6366 (daily ed. Aug. 18, 1982)), and Representative Paul indicated that he intended to file a similar suit. *Id.* at H6368. These statements were noted and discussed. See *id.* at H6555 (daily ed. Aug. 19, 1982) (remarks of Rep. Rostenkowski); *id.* at H6561 (remarks of Rep. Gradison).

Before the House turned to the Conference Report, on August 19, 1982, petitioner Representative Rousselot once more introduced his resolution stating that H.R. 4961 contravened the Origination Clause. 128 Cong. Rec. H6528 (daily ed.). The House again voted to table this resolution. All petitioners voted against the motion to table. *Id.* at H6528-H6529. Following debate on both the merits of the

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[3]Another roll call vote followed immediately on a motion to instruct the House conferees. Petitioners all voted on this proposition (some for and some against), and the motion passed 299 to 89. 128 Cong. Rec. H4787-H4788 (daily ed. July 28, 1982).

bill and the Origination Clause issue, the House agreed to the Conference Report, with all petitioners voting against it. *Id.* at H6635-H6636.

The Senate also agreed to the Conference Report and passed the bill on that same day. 128 Cong. Rec. S10945-S10946 (daily ed. Aug. 19, 1982). The bill was then signed by the Speaker of the House pro tempore and the President of the Senate pro tempore and was certified by the Clerk of the House of Representatives as having "originated in the House of Representatives" (C.A. App. 269, 270). The President signed the bill into law on September 3, 1982 as the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324.

2. Petitioners, all of whom were members of the House of Representatives during the 97th Congress,[4] sued the House, the President of the Senate, the Clerk of the House, and the Secretary of the Senate. They alleged that H.R. 4961 violated the Origination Clause because it arose in the House as a bill to lower tax revenues but was amended in the Senate to become a bill increasing revenues.

Petitioners claimed that they were injured as members of the House (and certain of them as members of the House Ways and Means Committee) through "interference with the performance of their legislative duties in connection with the origination of bills for raising revenue and their sworn duty to support the Constitution * * *, and injury to them individually and derivatively as members of the House by abrogation of the privilege and duty of the House under

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[4]One of the original plaintiffs, Representative Williams, is no longer participating in this case. Four of the petitioners (Reps. Santini, Rousselot, Evans, and Jeffries) were not reelected to the 98th Congress. Petitioners Levitas, Martin, and Daniel Crane were not reelected to the 99th Congress.

the Constitution to originate all bills for raising revenue" (C.A. App. 19).[5] The United States intervened in the suit because the constitutionality of an Act of Congress was being challenged.[6]

The district court dismissed the complaint, holding that petitioners "lack standing to maintain th[is] action[]" (Pet. App. 39a; footnote omitted). The district court reasoned as follows (*id.* at 43a-44a; citations omitted):

> As the legislative history plainly reflects, [petitioners] had ample opportunity to exercise their voting rights and in fact * * * voted their disapproval of TEFRA at every turn. [Petitioners] fully participated in the legislative process which culminated in the passage of the act they now challenge. They were simply outvoted. The argument that [petitioners'] votes were effectively nullified by the Senate's usurpation of their right to originate revenue raising bills, and the House acquiescence therein, is unpersuasive. * * * [W]here, as in this case, "Congress itself, and not the Executive, renders any individual legislator's vote ineffective, the courts have no role." * * *
>
> In short, plaintiffs speak as a frustrated minority. Unless the institution of Congress itself has suffered injury-in-fact at the hand of the Executive, an individual legislator has no standing to complain of impairment to the effectiveness of his vote. * * * Here, Congress specifically considered and rejected the suggestion

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[5]Representative Paul filed a similar action in the same court after the House and Senate had passed H.R. 4961. He sued the United States, as well as the same defendants named by petitioners. Representative Paul's case was consolidated with this action in the district court.

[6]The individual and institutional congressional defendants opposed petitioners' suit and were represented by the Senate Legal Counsel and the Counsel to the Clerk of the House of Representatives.

> of any constitutional infirmities in the enactment of TEFRA, and in fact opposes this lawsuit. Judicial interference into this intralegislative dispute is constitutionally precluded.

The district court further concluded that even if petitioners had standing, "the doctrine of equitable discretion announced by [the District of Columbia Circuit] in *Riegle* v. *Federal Open Market Committee* [, 656 F.2d 873 (1981), cert. denied, 454 U.S. 1082 (1981)] squarely governs this action and mandates dismissal." Pet. App. 44a.

The court of appeals unanimously affirmed the judgment, but the members of the panel disagreed on the appropriate rationale. The majority concluded that petitioners had standing (Pet. App. 6a-15a). It variously described the injury they had suffered as "the deprivation of an opportunity to debate and vote on the origination of TEFRA" (*id.* at 9a); "the nullification of their right to originate, by debate and vote, a bill for raising revenue prior to legislative action by the Senate" (*ibid.*); injury to the "rights to participate and vote on legislation in a manner defined by the Constitution" (*ibid.*); injury "by distortion of the process by which a bill becomes law — a process in which a legislator has a right and a duty to participate" (*id.* at 10a); "the deprivation of debate and a vote in the origination of revenue-raising legislation" (*ibid.*); "deprivation of a particular opportunity to vote in a manner prescribed by the Constitution" (*id.* at 11a); and an injury to the "right to participate in a constitutionally prescribed method of enacting revenue-raising legislation" (*id.* at 15a). The majority concluded, however, relying on *Riegle*, that separation of powers concerns warranted the district court's exercise of "remedial discretion" (*id.* at 15a) to deny relief. *Id.* at 15a-20a. The majority explained that petitioners' "dispute over

the origination of TEFRA is primarily a controversy with other members of Congress" and that litigation like petitioners' suit "pose[s] a real danger of misuse of the courts by members of Congress whose actual dispute is with their fellow legislators" (*id.* at 19a).

In a separate concurrence, Judge Scalia criticized the majority's reliance on the doctrine of "remedial discretion" (Pet. App. 30a-37a) and urged that petitioners lack standing (*id.* at 29a-30a). He reasoned as follows (*id.* at 25a-26a):

> The [correct] test of congressional standing * * * must take as its point of departure the principle that we sit here neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings, or the resolution of those inter-branch disputes through the system of checks and balances * * * brings forth a result that harms private rights, it is no part of our constitutional province * * *.
>
> In my view no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest.

**ARGUMENT**

1. This case is indistinguishable from *Riegle* v. *Federal Open Market Committee,* cert. denied, 454 U.S. 1082 (1981), and the Court should deny review for the reasons stated in our brief in opposition in that case.[7] The plaintiff

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[7]We have sent a copy of that brief (No. 81-398) to counsel for the other parties. This Court has consistently denied review of similar cases involving legislator standing. See, in addition to *Riegle, Vander Jagt* v. *O'Neill,* cert. denied, No. 82-2001 (Oct. 3, 1983); *Crockett* v. *Reagan,* cert. denied, No. 83-1398 (June 18, 1984).

in *Riegle*, a United States Senator, claimed that an Act of Congress violated the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. As we explained in our brief in opposition in *Riegle*, the Appointments Clause does not protect the interests of individual Senators; it protects the prerogatives of the Senate as a whole. Senator Riegle could not claim to be representing the Senate as a body, because the Senate had passed the legislation he was challenging. Accordingly, he had failed to allege a "distinct and palpable injury to himself" (*Warth* v. *Seldin*, 422 U.S. 490, 501 (1975)) that was even "arguably within the zone of interests * * * protected" by the Appointments Clause (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)). See also *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12-13; *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 475 (1982).

Petitioners' claim was correctly dismissed for the same reasons. The Origination Clause does not confer powers or rights on individual Representatives; rather, it establishes a prerogative of the House of Representatives as a body. Consequently, petitioners cannot show that any constitutionally protected interest they possess as individual Representatives was invaded. Indeed, both petitioners and the court of appeals had difficulty in even articulating the individual interest that was allegedly at stake; they were able to provide only vague and abstract formulations of the injury they had suffered. See page 7, *supra*. See also Pet. 8 (petitioners "have suffered an injury to their constitutionally-given duty to debate and vote on the origination of a bill for raising revenue."). Petitioners were of course never denied the right to vote or to participate in the legislative process

by debate or in any other way.[8] These various formulations amount to no more than the assertion that —in the court of appeals' words — petitioners had a "right to participate in a constitutionally-prescribed method of enacting * * * legislation" (Pet. App. 15a). But this interest, like " 'the generalized interest of all citizens in constitutional governance' " (*Valley Forge,* 454 U.S. at 483, quoting *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208, 217 (1974)), is plainly insufficient to support standing.

A violation of the Origination Clause might be said to injure the interests of the House of Representatives as an institution, but — even assuming that such an injury would be judicially cognizable — the House made it abundantly clear, in its repeated rejection of petitioners' legislative efforts, that it did not object to TEFRA on Origination Clause grounds. Petitioners do not suggest that the House authorized them to sue on its behalf; in fact, petitioners' suit was brought against various representatives of the House as an institution. The House has not supported petitioners' suit at any time during these proceedings.[9]

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[8]In any event, neither the Constitution nor any statute guarantees members of Congress the right to participate in debates or in committee consideration of proposed legislation; the House is free to proceed without debate or reference of a bill to committee if it chooses to do so. Petitioners' suggestion (Pet. 8) that the contents of the bill that became TEFRA would have been different if it had undergone a different form of legislative consideration does not identify an injury to a protected interest of petitioners and, in any event, is too "conjectural" to support standing (*Warth,* 422 U.S. at 504-507, 509).

[9]Moreover, the House is able to protect its interests under the Origination Clause by simply refusing to pass legislation that it believes improperly originated in the Senate—something it declined to do here despite petitioners' urgings.

Petitioners contend that denying them standing for this reason is tantamount to saying that "Congress may waive a * * * constitutional command" (Pet. 7). But there is no more of a "waiver" involved here than there is whenever the only party who arguably has standing chooses not to assert his rights in court. As this Court has recently reiterated, " '[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute' " (*Allen*, slip op. 12, quoting *Warth*, 422 U.S. at 498). Because petitioners cannot show that they have suffered a cognizable injury to a legally protected interest, they are not entitled to a resolution of their claim on the merits. The House as an institution, which may or may not be entitled to a judicial resolution of this issue, has not sought one.

2. We do not necessarily disagree with petitioners' criticisms of the District of Columbia Circuit's doctrine of "equitable discretion" or "remedial discretion"; we expressed our reservations about that doctrine in our brief in opposition in *Riegle* (at 7-9) and in our brief in the court of appeals in this case (at 10-12). But as we noted in our brief in opposition in *Riegle*, many of the overlapping notions associated with the concept of justiciability can legitimately play a role in expressing the separation of powers concerns to which a suit like petitioners' gives rise. As we also explained in that brief, the District of Columbia Circuit has achieved an underlying consistency of results in its approach to suits by Members of Congress; it has entertained claims only when a specific legislative enactment was nullified by executive action.[10] The result in this case is consistent with that

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[10]Recently, in *Barnes* v. *Kline*, No. 84-5755 (D.C. Cir. Aug. 29, 1984), petition for rehearing pending, a divided panel of the District of Columbia Circuit issued an order upholding on the merits the claims of certain members of Congress and individuals purporting to represent the Houses of Congress that the President's pocket veto of a bill passed by Congress was ineffective. The court of appeals' opinion in *Barnes* has

pattern. Moreover, as Judge Scalia's concurring opinion shows, the doctrine of equitable discretion is not considered settled law by all members of the court of appeals and may well be reexamined at some point in the future. See also *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1185 (D.C. Cir. 1983) (Bork, J., concurring), cert. denied, No. 82-2001 (Oct. 3, 1983).[11] In these circumstances, the fact that the court of appeals has chosen a questionable doctrinal rationale for its correct decision not to entertain petitioners' claim on the merits is not a sufficient reason for this Court to intervene.

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not yet been released. But it seems unlikely that *Barnes* marks a departure from the prior course of decisions on congressional standing in the District of Columbia Circuit; as we noted in our brief in opposition in *Riegle*, the only other case even remotely resembling petitioners' in which that court has conferred standing on a Member of Congress is *Kennedy* v. *Sampson*, 511 F.2d 430 (1974), which also involved a challenge to a purported pocket veto. Moreover, the suit in *Barnes* — unlike petitioners' suit — was brought not just by individual Members but by the Speaker of the House and the Senate Legal Counsel, who claimed to represent their respective Houses of Congress. The court of appeals might have reached the merits on the basis of a conclusion that the Speaker and the Senate Legal Counsel had standing even though the individual Members did not.

[11]In addition, the conclusion by the majority of the court below that petitioners have standing was based primarily on its belief that what it described as "the separation-of-powers concerns presented by this case" are properly viewed not as affecting petitioners' standing but as "affect-[ing] the proper exercise of judicial discretion to grant or withhold declaratory relief" (Pet. App. 15a). After the court of appeals' opinion was issued, this Court made clear that separation of powers concerns are a critical underpinning of the standing doctrine. *Allen*, slip op. 12.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1984

DOJ-1984-11

Office - Supreme Court, U.S.
FILED
DEC 18 1984
ALEXANDER L. STEVAS
CLERK

No. 84-389

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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W. HENSON MOORE, U.S. REPRESENTATIVE, SIXTH DISTRICT, LOUISIANA, *et al.*,

*Petitioners,*

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

*Respondants.*

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## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## Reply Brief of Petitioners In Support of Certiorari

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The Court of Appeals held that congressional plaintiffs suffer a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), when a constitutional defect in the legislative process deprives them of the opportunity to discharge constitutional obligations that properly belong to their office, and are within the "zone of interests," *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982), created by the Origination Clause. See also, *Riegle v. Federal Open*

*Market Committee*, 656 F.2d 873 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). If this ruling is in error, as the Government's Brief states that it is, neither the Court of Appeals for the District of Columbia nor any other court will be able to learn of it by a mere denial of certiorari.

This case presently stands in the following posture: The United States Court of Appeals for the District of Columbia Circuit held that although this is a justiciable case or controversy over which courts of the United States concededly have subject matter jurisdiction, and although the petitioners presumptively bring a valid claim arising under the Constitution (Pet. App. A, at 6a), the case need not be decided for "equitable" reasons. The only question raised in this Court is whether the admittedly flexible powers of the federal courts can be said to go so far as to decline to adjudicate a matter properly before them. Such a doctrine does not exist outside the D.C. Circuit. It is well established in the D.C. Circuit. No conflict of circuits will likely occur because the questions to which the "equitable" discretion doctrine is applicable arise only at "the Seat of the Government of the United States." United States, Constitution Article 1, Section 8, Clause 17.

If the Government's standing argument is taken seriously, the legislative branch is completely at liberty to ignore the Origination Clause of the Constitution—and much else besides. Any legislative majority sufficient to enact a bill would equally be sufficient to waive, or to acquiesce in, constitutional defects in its passage. This "standing" doctrine is even stranger than the "equitable" discretion doctrine of the D.C. Circuit. But if the Government succeeds in securing the denial of review, its strange stand-

ing doctrine will never see the light of day, for it was clearly rejected by a majority of the court below and a suggestion for rehearing en banc was denied.

The Government's argument boils down to the proposition that the "equitable" discretion doctrine, which Respondents put forward in both lower courts, is an appellate species of harmless error. Such an argument assumes, as given, a matter that is not even before this Court—that the violation by the Congress of the Origination Clause is, one way or another, not a justiciable question. Taking it as established that the Origination Clause has indeed been violated, these petitioners should not, in the Government's view, be allowed to raise that claim in court. Nor, for all that appears, should anyone be allowed to raise it.

It is far too late in the day for the Government to claim that the House—or even the House, Senate and President together—could ignore with impunity (for that is precisely what non-justiciability means) an unambiguous constitutional directive concerning how the legislative process may be ordered. *See, Immigration and Naturalization Service v. Chadha*, ___ U.S. ___, 77 L.Ed. 2d 317 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976). Where would such a power come from if not from the Constitution itself? Can the Constitution require, and at the same time not require, that legislation be enacted according to a certain procedure? Such a self-contradictory proposition refutes itself.

The Government readily concedes that the D.C. Circuit's "equitable" or "remedial" discretion doctrine—the principal holding of the D.C. Circuit—is untenable. But it argues here, as it did in opposing certiorari in *Riegle v. Federal Open Market Committee*, that it is unnecessary for this Court to review the "remedial" discretion doctrine, because two (out of eleven) judges of the D.C. Circuit are on record

as opposing it, and that, left to its own devices, the D.C. Circuit may cure itself of its error without outside help. That was a forlorn hope in *Riegle*, as this very case proves. Only action by this Court will effect the cure which the Government concedes is necessary. It makes no sense to suggest, as the Government seems to, that a minority of two judges be treated as a majority of the Court of Appeals, and that the majority be treated as a wayward minority that will, like Mary's little lamb, find its way home in time. The "equitable" discretion doctrine grows stronger and more entrenched with each denial of certiorari. This Court may achieve the Government's stated objective by granting certiorari limited to the "equitable" or "remedial" discretion doctrine, which is all that Petitioners raised, summarily reversing the judgment below, and remanding for further proceedings.

Petitioners respectfully renew their prayer that their petition be granted.

Respectfully submitted,

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